(1)

No. 04-53 MAY 8 2004

IN THE SUPREME COURT OF THE UNITED STATES

HARRY BUTRY, JR.,

Petitioner

vs.

SUPERINTENDANT SCI-COAL TOWNSHIP, Superintendant at SCI-Coal Township; LUZERNE COUNTY, District Attorney, ATTORNEY GENERAL,

Respondents

On Petition for Writ of Certiorari To The U. S. Court of Appeals for the Third Circuit

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PETITION FOR WRIT OF CERTIORARI

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Questions Presented for Review

1. Whether the Third Circuit's decision, denying Mr. Butry a certificate of appealability, conflicts with the standards established by the United States Supreme Court in Miller-El vs. Cockrell, 537 U.S. 322, 123 S.Ct. 1029, 154 L.Ed. 931 (2003). More particularly, (a)(1) whether there is a substantial argument that trial counsel failed to pursue a reasonably arguable defense by failing to have a diminished capacity jury instruction requested and given, **or**, (2) whether reasonable jurists could disagree over this issue, and (b)(1) whether Mr. Butry has made a substantial showing that there was an arguable basis for the jury to consider a challenge to the government's premediation argument, **or**, (2) whether reasonable jurists could disagree over this issue.

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Opinions Below

There was no opinion by the Pennsylvania trial court on these issues. The opinions of the Pennsylvania appellate courts are attached hereto. (App. 28a-38a)

The opinions of the federal district court were not reported. A copy of said opinions are attached hereto. (App. 5a-27a)

The opinions of Third Circuit were not officially reported. A copy of said opinions are attached hereto. (App. 1a-4a)

Jurisdiction

The original judgement of the Third Circuit was entered on January 13, 2004. On February 9, 2004, the Third Circuit entered its denial of Ms. Butry's Petition for Rehearing.

This Court's jurisdiction is invoked pursuant to 28 U.S.C. Section 1254(1).

Statement of the Case

On August 21, 1997, Mr. Butry shot and killed Tina Marcario.

State Court Proceedings

The sole issue at trial was the degree of Mr. Butry's guilt.

On January 16, 1998, after a trial by jury conducted by the Honorable Hugh F. Mundy of the Luzerne County, Pennsylvania Court of Common Pleas in Wilkes-Barre, Pennsylvania, Mr. Butry was found guilty of first degree murder, 18 Pa.C.S. Section 2502(a).

On March 20, 1998, Mr. Butry was sentenced to life imprisonment without parole. This sentence is a mandatory sentence over which Judge Mundy had no discretion. 18 Pa.C.S. Section 1101(b).

At sentencing, Mr. Butry was represented by his trial counsel.

On March 27, 1998, a motion for post-trial relief was filed by trial counsel. This motion did not raise any of the issues which are the subject of the application for a certificate of appealability. This motion was denied on July 15, 1998.

On August 3, 1998, Mr. Butry filed an appeal to the Pennsylvania Superior Court. Present counsel undertook Mr. Butry's representation for this appeal and for all subsequent proceedings.

The issues, which were raised before the district court and are being raised herein, were first raised in the appeal to the Pennsylvania Superior Court. In accordance with and as required by Pennsylvania law, new counsel has an obligation to raise all claims of ineffective assistance of prior counsel at the first opportunity. Therefore, appellate counsel obtained and expanded the trial court record to

include additional material, which presented a factual basis for Mr. Butry's (a) defense of diminished capacity due to a drugged condition and (b) defense of ready access to other firearms claims.

The remedies requested by Mr. Butry included that his case be remanded to the trial court for additional factual hearings on Mr. Butry's diminished capacity due to a drugged condition and ready access to other firearms claims.

The Pennsylvania appellate courts concluded that there was no need for any additional factual hearings. The Pennsylvania appellate courts concluded, **as a matter of law,** that Mr. Butry would not be entitled to any relief.

On October 15, 1999, the Pennsylvania Superior Court denied Mr. Butry's appeal.

On October 29, 1999, Mr. Butry filed an application requesting reargument or reconsideration with the Pennsylvania Superior Court. This application was denied on December 20, 1999.

On January 18, 1999, Mr. Butry filed an application for allowance of appeal with the Pennsylvania Supreme Court. This application was denied on May 18, 2000.

Federal District Court Proceedings

On May 11, 2001, Mr. Butry filed his habeas corpus petition and a supporting brief with the district court.

On June 11, 2001, the Respondent Luzerne County District Attorney's Office filed a response to Mr. Butry's habeas corpus petition and a brief in support of its response.

On June 25, 2001, Mr. Butry filed a reply brief.

The district court permitted Mr. Butry to obtain certain discovery from the government in accordance with Rule 6 of the Rules Governing Section 2254 Cases in the United States District Courts.

The district court permitted the parties to file additional briefs.

The district court denied Mr. Butry's Petition **without** conducting an evidentiary hearing.

Simiarly, the Third Circuit denied Mr. Butry's Petition for a Certificate of Appealability.

Mr. Butry's basis for this application is centered upon two (2) legal theories, (1) a diminished capacity due to a drugged condition theory and (2) a ready access to other firearms theory.

Diminished Capacity

Trial counsel pursued a heat of passion defense.

At trial, Mr. Butry testified that at the time of the shooting, he was "on" prozac and had, also, taken valium.

Trial counsel did not request and did not receive a diminished capacity jury instruction. In particular, trial counsel did not request a jury instruction that a voluntary drugged condition would permit the jury to conclude that Mr. Butry did not have the specific intent to commit first degree murder and, thereby, permit the jury to consider a verdict of third degree murder. See 18 Pa.C.S. Section 308.

Trial counsel did not present any argument to the jury or attempt to develop a diminished capacity defense due to Mr. Butry's drugged condition.

During the district court proceedings, Mr. Butry was permitted to obtain certain discovery from the government. As disclosed to Mr. Butry as a result of this discovery, there is **no** factual basis to conclude that trial counsel had any factual basis for not raising a diminished capacity due to a drugged condition defense. Rather, the sole basis for not pursuing a diminished capacity due to a drugged condition defense is the legal position taken by the district court and by the Pennsylvania appellate courts that a diminished capacity defense, **necessarily and as a matter of law**, conflicts with a heat of passion defense.

The undisputed facts before the district court included trial counsel's reliance upon a written report by a Dr. Robert L. Sadoff. This report supports Mr. Butry's position that at the

time of the offense conduct (a) he was under the influence of prozac and valium and (b) "he was out of control".

Dr. Sadoff's report does not explore a diminished capacity defense due to voluntary drug use.

The **undisputed facts** before the district court were that neither Dr. Sadoff nor trial counsel had considered the viability of a diminished capacity defense due to Mr. Butry's voluntary drug use.

Ready Access to Other Firearms

The government presented evidence at trial that for several days prior to the shooting, Mr. Butry had been frantically trying to procure a firearm with which to kill Tina Marcario. However, contrary to the government's theory of the case, during the period of time during which the government contended

that Mr. Butry was frantically trying to procure a firearm, Mr. Butry had, **in fact**, ready access to several other firearms.

Trial counsel (a) did not investigate the issue of Mr. Butry's ready access to other firearms, (b) presented no witnesses or evidence on this issue, and (c) did not attempt to develop this issue in any manner.

The district court concluded that this issue had, in fact, been adequately raised at trial. The factual basis for this conclusion is that the twenty-second government witness, Steve Fogle, testified during the government's case-in-chief, that Mr. Butry was attempting to convince him (Steve Fogle) to provide Mr. Butry with a gun, but that Steve Fogle refused.

Statement of Reasons Relied Upon for an Allowance of Appeal

In determining whether to grant a certificate of appealability, the applicable standard is whether (a) jurists of reason could disagree with the district court's resolution of a petitioner's constitutional claims **or** (b) jurists could conclude that issues presented are adequate to deserve encouragement to proceed further. Miller-El vs. Cockrell, 537 U.S. 322, 123 S.Ct. 1029, 154 L.Ed. 931 (2003).

Diminished Capacity Due to a Drugged Condition

The district court concluded that trial counsel was not ineffective for failing to investigate and pursue a defense of diminished capacity due to a drugged condition. More particularly, the district court concluded that,

as a matter of law, diminished capacity is inconsistent with the defense chosen by trial counsel, i.e. a heat of passion defense.

A heat of passion defense is **NOT** inconsistent with a diminished capacity defense. Consider Commonwealth vs. Legg, 551 Pa. 437, 711 A.2d 430 (1985). Accordingly, **as a matter of law**, the district court's decision is simply **wrong**.

Moreover, because trial counsel never even considered the viability of a diminished capacity defense due to a drugged condition, trial counsel did not even undertake any analysis of which defense to pursue. Because trial counsel did not even consider the viability of a diminished capacity due to a drugged condition defense, trial counsel was in no position to determine whether or not to pursue this defense. See Strickland vs. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674

(1984); Hill vs. Lockhart, 472 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). Consider also Commonwealth vs. Perry, 537 Pa. 383, 644 A.2d 704 (1994).

Ready Access to Other Firearms

A material part of the government's case against Mr. Butry was based on the government's factual position that Mr. Butry was running wild, frantically trying to get a firearm for several days before the offense conduct. This factual position supported the government's conclusion that the shooting had been premeditated.

Therefore, evidence that Mr. Butry had ready access to other firearms during this same time period would have materially undermined the government's theory of the case.

The district court concluded that this issue had, in fact, been adequately raised at trial. The factual basis for this conclusion is that the twenty-second government witness, Steve Fogle, testified during the government's case-in-chief, that Mr. Butry was attempting to convince him (Steve Fogle) to provide Mr. Butry with a gun, but that Steve Fogle refused.

The evidence presented at trial **did not, in any way**, raise the fact that Mr. Butry had ready access to several other firearms. The district court's conclusion is **wholly devoid** of any **factual** basis.

Conclusion

For the foregoing reasons, the Court should grant Mr. Butry's application for a writ of certiorari

Respectfully,

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